Supreme Court of the United States.

LOUIS AUGUSTE MARANDE, JULES EMILE ROEDERER and PAUL LEON ROEDER,

Plaintiffs in Error,

AGAINST

THE TEXAS AND PACIFIC RAIWAY COMPANY,

Defendant in Error.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

Statement.

A detailed statement of facts is not deemed necessary here, the Court being familiar generally with the subject matter of the series of actions of which this is one (Clayton vs. Texas & Pacific R. Co., 84 Fed., 305, 173 U. S., 348; Reiss vs. Same, 98 Fed., 534; Callender vs. Same, 98 Fed., 538). In this case the bill of lading in terms exempted the carrier from liability for loss or damage by fire (Record, p. 170). Considerable testimony was produced by the plaintiffs, the object of which was to establish negligence of the defendant, causing the loss. This testimony will

be discussed fully later and need not be set forth at this time. The trial Court at the close of plaintiffs case, directed the Jury to return a verdict in favor of the defendant. This action of the trial Court was affirmed by the Circuit Court of Appeals (102 Fed. Rep., 246).

The 65 bales of cotton involved in this suit arrived in Westwego on November 7th, 1894, and were never taken out of the cars. No transfer sheets or notice of arrival had been sent to the steamship company (Record, p. 30). The fire occurred on the evening of November 12th, 1894. The bill of lading covering the cotton contained a clause exempting the carrier from liability for any loss or damage by fire from any cause or wheresoever occurring, but it is claimed that defendant is not entitled to the benefit of this exemption, first, because of an alleged deviation, and second, on the ground of negligence.

FIRST POINT.

There is no force in the plaintiff's contention that the carriage of the cotton in suit to Westwego constituted a deviation whereby defendant lost the benefit of any exemption in its favor contained in the bill of lading.

This point, raised but not passed upon in the Clayton case, urged again in the Reiss case, and there decided in defendant's favor by the Circuit Court of

Appeals (98 Fed. R., 534), was again strenuously pressed in this case in the lower courts by plaintiff's counsel, and with no apparent justification. In the brief filed in the Circuit Court of Appeals it was claimed that there was in this record "additional proof" not contained in the record in the Reiss case.

The so-called "additional proof" disclosed by the record is merely that at the time of the fire the defendant had a large amount of cotton on hand at New Orleans, as well as at Westwego. In their brief in the Court of Appeals counsel quoted from the testimony of Mr. Harris, agent of the Cromwell Line, to the effect that that line received thousands of bales of cotton from the Texas and Pacific Railroad Company at its dock in the City of New Orleans, some of which was destined for Europe. On this fact they argued that the defendant

> "was carrying more cotton to New Orleans than it did "to Westwego, and was during all that time continu- "ally forwarding cotton by steamships from New "Orleans."

This was urged by them as a ground for overturning the decision of the Court in the Reiss case that Westwego was,

> "so far as export cotton is concerned, that port [New "Orleans] in the well-understood commercial and busi- "ness sense, and was the part of the port of New Or- "leans where steamship companies rightfully expected "to receive cotton from Texas for transportation to "Europe" (98 Fed., 538).

The difficulty with this contention is that the plaintiffs failed to show that the cotton handled in New Orleans was of the same class as that handled at Westwego, *i. e.*, export cotton shipped under a through bill

of lading from some point in Texas to a foreign port via the Texas & Pacific Railroad Company (or a connecting line) and a line of steamships running *from New Orleans to a foreign port.* Plaintiff's counsel quoted from the testimony of Mr. Harris, but entirely omitted to set forth two important features: First, that his line of steamships runs only from New Orleans to New York (New York being the other terminus of the line); and, second, that the "through rate," as to which he testified, was from the point of shipment to the New England Mills (Record, p. 34). He expressly said (Record, p. 35) that he knew nothing about foreign export cotton. The fact, therefore, that his coasting steamers, which ran no farther than New York, took their cotton at their docks in the City of New Orleans instead of at Westwego, is of no significance. It in no way affects the force of the abundant evidence elsewhere in the record, establishing the existence of the custom in respect of foreign export cotton.

In the brief filed in the Reiss case in this court, we have presented the authorities bearing upon this question, and will not repeat what we have said there. A few additional considerations may be pertinent.

First. The rule invoked by the plaintiff, that a carrier is liable in the case of deviation, is applicable only when such deviation has been from the material terms of the contract. That is not the situation here.

(a) New Orleans was not the destination of the cargo. Nothing was to be done with the cotton there except transfer it from the cars to the steamship for further transportation. At what precise point in the harbor this was done was a matter of no

consequence to either shipper or consignee. The words "port of New Orleans" were of no significance except as indicating the point of departure of the vessels of the designated steamship line. So long as the cotton was placed on one of the Elder-Dempster Line ships clearing from the port of New Orleans, the material requirements of the contract were fulfilled, although the physical transfer of the cotton from the cars to the ship had been made at a point not within the boundaries of the legally created port. As used in this bill of lading, therefore, the words "port of New Orleans" have no narrow or restricted meaning, but were simply to describe in general terms the point of transshipment. As was said by LUSH, J., in *Harrower vs. Hutchinson*, 38 L. J. (Q. B.), 185, they

"must be read in a liberal sense, not merely as meaning those places which are technically and properly known as ports, but all places where ships are accustomed to resort for the purpose of taking in cargo."

See, also similar language in Sailing Ship Garston Company against Hickie, 15 Q. B. Div., 580.

(b) The argument was advanced in the Courts below that it was intended by the shipper that he should have the benefit of such special protection from fire as would be afforded to him by the New Orleans Fire and Police Department, but this is fallacious. It cannot be assumed that the legal limits of the port of New Orleans are coterminous with the City of New Orleans proper, or those parts of it which have the benefit of police and fire protection. Doubtless there are many points within the technical construction of the bill of lading contended for by the plaintiffs that are quite as remote as Westwego from the thickly set-

tled portions of the City. Had the theory now advanced been correct the shipper would have insisted on a bill of lading providing for transshipment, not in the "port of New Orleans," but in the City of New Orleans, or at some particular pier or warehouse in that city.

SECOND. Even if the deviation could be regarded as material it would not affect the defendant's rights in this case, because the testimony shows that it was the general and established usage of the port for steamships to take delivery of export cotton coming by the Texas and Pacific Railroad at Westwego.

(1) The plaintiff's contention, as stated in the brief filed in the Court of Appeals, is

"that the carrying of cotton to Westwego by defendant alone, out of the many competing lines of railroad centering in New Orleans, * * * was not a carriage in accordance with the terms of a bill of lading calling for transportation to the port of New Orleans, and did not operate to change the custom which had theretofore been universal and by virtue of which all cotton directed to be carried to the port of New Orleans was carried to New Orleans and delivery thereof made at the City Front."

The difficulty with this contention is that it is entirely at variance with the evidence, the fact being that it was the universal custom among foreign steamship lines in New Orleans to take delivery of cotton from the various railroad companies having termini in New Orleans at points remote from the City Front. The Court will notice, from an examination of plaintiff's Exhibit F, the map printed at page 178 of the Record, the location of some of these terminals. Southport, for example, is located about a mile above the city

limits of New Orleans, and in another parish, on a branch of the Illinois Central Road (Herzog, Record, p. 111). At this point are located the Stuyvesant docks, owned by the Illinois Central Company (Hammond, Record, p. 60). Algiers, which is on the same side of the river as Westwego, some distance further down the stream, is a terminus of the Southern Pacific Railway Company (Boylan, Record, p. 118). Gretna (not named on the map) is also on the same side of the river as Westwego and about three miles further down the stream (Record, p. 13).

Mr. LeBlanc said (Record, pp. 49, 50):

"We used to make engagements for cotton, and "when it came in we went there for it, but we had no "special arrangement—just like anybody else. We "went to Westwego for it, and everybody did; there "was no special arrangement. * * * When I said "that our ships received cotton everywhere before "1894 and 1893, *I meant that they went to various "points to receive cotton. I should think that the bulk "of the cotton carried by the Harrison Line was received "at other points than their own wharf. That custom "was universal with steamships landing here in New "Orleans.* That is, at the terminals of railways the "steamship lines were all accustomed to receive cotton "which was shipped over the various rail lines which "was to go from the rail lines to the steamship "lines. * * *

"Q. It was the understanding, was it not, that in "these written contracts for through rates Westwego "was the place of reception by the steamship company "of the cotton? A. Yes, sir.

"Q. And that had been so for some years prior "to 1894, hadn't it? A. I think so.

"Q. This wharf at Westwego is not the only wharf "of the kind where similar shipments are made, is it? "A. No. There were not many others. There were "only two others. And there were in 1894, *they were "at Southport and Gretna.* Gretna is opposite New "Orleans on the west bank of the river, the same side "as Westwego. A little further down near the city. "And Southport is higher up and on the east side.

" On the same side as the City of New Orleans. *The* " *same method of handling and receiving cotton was ob-* " *served there.*"

Mr. Hammond said (Record, p. 54) :

" I have one wharf at the foot of St. Mary's Street, " in the City of New Orleans, but I load many of my " steamers at the different terminals as well."

Speaking of deliveries at Westwego, he says again (at p. 60) :

" Q. The same arrangement obtains for cotton at " Southport ? A. At Southport, the Stuyvesant Docks " and Chalmette."

Mr. Sanders says (Record, p. 67) :

" Q. Prior to the erection of the dock at Westwego, " which was destroyed in November, 1894, where was " cotton delivered to your line for transportation ? A. " Well, *we had cotton delivered to us at the different* " *railway terminals and at our own wharf.*

" Q. Where were the terminals at which cotton was " delivered to you ? A. There was the Illinois Central " terminal at Southport. I think at that time we used " the Southern Pacific at Gretna, and I suppose the " Texas and Pacific at Westwego also."

That the same practice was pursued by other steamship companies is evident from the allusions in the testimony of other witnesses called by the plaintiff, who spoke less fully on the subject.

Mr. Fornaris said (Record, p. 33) :

" I would not send the ship anywhere for ten bales " of cotton ; there had to be a sufficient amount of cot- " ton to justify me in sending for it. That was true at " Westwego, Southport, on this side, Algiers, or any- " where."

And Mr. Warriner, Agent of the Elder-Dempster Line, said (Record, p. 41) :

" We have taken less than 2,000 bales at Westwego, " certainly. It might suit us sometimes to take less. " *If we were at Southport* we might drop over to West- " wego and take whatever they had and we did that, I " think, in several instances."

From the foregoing it appears conclusively that the custom of the port was for steamship companies to take deliveries of cotton at the terminals of the different railways, irrespective of whether or not they were within the city limits. Whether or not Southport, Gretna or Algiers were within the legal limits of the port does not appear from the record, but it is evident from an inspection of the map that they are practically as remote as is Westwego from the heart of the City of New Orleans.

(2) The fact that it was not the custom of the steamship companies to go to Westwego or other terminals similarly located, excepting for a certain amount of cotton, does not affect the question of the existence of a general custom or usage regulating shipments under a through bill of lading like the one in suit.

(a) It must, as a rule, have been the case that there was a sufficient amount of cotton ready to satisfy the requirements of the steamship companies, for the evidence is clear that practically all export cotton on through bills of lading by the T. & P. road was taken on board the steamers at Westwego, and only shipments for local points or cotton shipped for foreign ports, on other than through bills of lading, were delivered in New Orleans proper.

Mr. Le Blanc said (p. 51) that he could not remember any through shipments of cotton in 1894 where it was delivered at his dock in the City. Whatever shipments were made from his two wharves in

New Orleans "were smaller amounts from smaller "roads for spot shippers and for individual shippers."

Mr. Sanders said (p. 70):

"But I think that after the erection of the wharf at "Westwego all cotton was loaded there, that is, all ex- "port cotton, so far as our lines were concerned.

"Q. That is, the delivery of export cotton in the "City of New Orleans, along the Front, had about "practically ceased? A. Yes, sir."

Mr. Ross testified (pp. 62, 63) to the same effect.

(b) In addition to this general evidence there is the particular fact appearing in this case that at this time there was an accumulation of cotton on the Westwego docks largely in excess of the capacity of the steamship lines to remove. There is, therefore, no force in plaintiff's suggestion that because the shipment in the present suit was only one hundred bales it could not properly be delivered at Westwego. No such narrow view is admissible under the conceded facts. The particular engagement of cotton, of which this shipment was a part, under contract No. 73, was for 2,500 bales (pp. 176, 177), and it appears from the Cotton Reports for several days preceding the fire that there was much more than this amount of cotton destined for Havre by the Elder-Dempster Company Line at Westwego (Record, pp. 179–187).

Under these circumstances the precise situation described by the shipping agents was presented, namely: That they would always go to Westwego to take export cotton, provided the shipment was of a sufficiently large quantity to comply with their understanding with the Railroad Company.

(c) The fact that this general usage of the port may not have been known to the shipper (which, by the

way, does not appear in this case) does not affect the question of the defendant's right to make such a delivery.

In Hostetter vs. Park, 137 U. S., 30, certain merchandise was shipped from Pittsburgh on board a barge, to be transported from Pittsburgh to New Orleans, and "to be delivered without delay in like good order at the port of New Orleans, Louisiana [the dangers of fire and unavoidable accidents excepted]." It appeared that when the tug having the barge in charge in question, and other barges, in tow, had arrived safely at Mount Vernon, Indiana, and taken on board additional cargo, it left all of the other barges and went back up the Ohio River several miles with the barge in question, taking on additional cargo. Upon the return down the river an accident occurred causing the loss of the cargo. The plaintiffs contended that this was a deviation, while the defendants claimed that it was a well-known custom for the owners of vessels to land their fleet at various points along the river, and there make a contract with shippers for the transportation of goods, and then detach from the fleet the barge or barges designated to receive such cargo, if it was not there, and send the barge or barges so designated to the place where the cargo might be stored, whether up, down or across the river.

The Supreme Court held, BLATCHFORD, J., writing the opinion, that it was no deviation from the regular and usual course of the voyage to touch and stay at a port out of the course if such departure was within the usage of the trade, and said "the same doctrine is applicable in the case of the bill of lading, even though the usage be not known to the particular shipper if it be established as a general usage."

There is much less ground in the case at bar to claim a legal deviation than there was in the case of Constable vs. Steamship Co., 154 U. S., 51. See upon this question the opinion in that case, (pp. 63 and 66 and cases cited). The Supreme Court, however, completely disallowed the claim in that case.

SECOND POINT.

No error was committed in excluding evidence as to the situation of affairs at Westwego prior to the erection of the dock at that place.

The testimony was uniformly to the effect that, after the construction of the dock, Westwego was a point for the reception and delivery of Texas and Pacific cotton shipped on through bills of lading, and that for that purpose it had superseded almost entirely the delivery of cotton at the various steamship companies' docks in New Orleans. In view of that testimony, what was done prior to the erection of the dock at Westwego was wholly immaterial. Also, it was wholly immaterial where cotton had formerly been delivered for transportation by the Texas and Pacific Railway Company to a particular line or lines of steamships. A clear, recognized place of delivery had come to be accepted by all the steamship companies under these T. & P. contracts, which was Westwego, and the mere fact that it had only been two years since the construction of the dock in no way prevented the general recognition of Westwego as the place of ship-

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ment. It had in the particular traffic come to be a prevailing custom.

Moreover, the excluded evidence was also objectionable as being cumulative, for it already abundantly appeared in the case that it was not until the dock was constructed that Westwego was used as a place of delivery.

It was also immaterial as to whether or not the party interrogated considered Westwego commercially within the port of New Orleans. The testimony excluded was open to the objection that it did not ask for a fact, but an opinion of the witness—it did not tend to establish a custom, but an opinion of the witness as to what the effect of custom or absence of custom established. Custom is a fact to be proved like any other fact. It cannot be proved by asking a witness his opinion of the existence or non-existence of the fact. The question asked of the witness Fallon did not ask for the fact, but for the witness' opinion. This was clearly improper.

THIRD POINT.

The Court did not err in taking the case from the jury and directing a verdict for the defendant in error.

A great amount of testimony was taken by the plaintiff to the effect that during the time the cotton was located on the wharf at Westwego and immediately prior to the time of the fire at Westwego, there were

serious labor troubles between the white and colored steamship labor in the city of New Orleans.

The testimony also showed that serious fires had occurred in New Orleans. The testimony was limited to steamship labor and related wholly to controversies primarily between white and colored laborers employed in loading vessels, but which had in its development included the owners of some of the vessel lines. None of this testimony, however, in any way related to the situation of affairs at Westwego, nor did the railway company in any way have any connection with the steamship labor. It employed none, and there were no labor troubles of any kind and no threatenings of incendiarism at Westwego.

With respect to these labor troubles, there was absolutely nothing in the testimony at any point upon this record in the slightest degree tending to connect them with the fire which occurred in the wharf at Westwego on the night of November 12, 1894.

The second point upon which testimony was offered tending to show negligence was as to the fire apparatus at Westwego. It was shown that the wharf was supplied with a certain number of hydrants at each of which was a line of hose and hose pipe and also supplied with barrels and chemical fire apparatus ; but there is nothing in the record to show that the wharf was not suitably provided with appliances fit for extinguishing fires. On the contrary the plaintiff's own testimony shows that it was supplied with hydrants in each shed, to which were attached hose all ready for use attached to a water tank with a sufficient pressure to throw the water, and also that there were a large number of barrels, which were kept filled with water.

In the former brief of plaintiff's charge is made against the mode of keeping the hose in these words :

"The testimony shows that this hose was piled back and forth on a shelf built around a post in the shed. It also shows that the customary way of keeping hose was to keep it stretched out so the nozzle would be easily accessible."

There was no citation of testimony to support this statement. The only testimony upon the subject is that upon the direct examination of James P. McArdle at page 135, as follows :

Q. How was it stretched, Captain? A. Stretched, if I remember right—now I think they had a baton nailed on the post; that is, the one towards the front—and the hose was stretched there from post to post.
Q. Well, was that the proper way to have it done? A. It was the usual custom, yes, sir.
Q. That is the usual way to have it done? A. Yes, sir.
Q. In that way—stretched along? A. Yes, sir.
Q. So, that when the water was turned on, the nozzle would be easily accessible. Is that what you mean? A. Yes, sir.

The testimony of L. Herzog regarding the fire apparatus used by the Illinois Central Co. at Southport was :

We had our hose rolled up at that time on reels. It was fed from a tank. The tank was about 150 or 200 feet from the wharf.

Also he describes a connection of hose with the standpipes, with a hundred feet to each standpipe, precisely the same length of hose which the defendant had attached to its standpipe at Westwego.

In the third place, testimony was offered as to some changes in the number of watchmen employed about this wharf during the month of November; that on the Sunday next previous to the fire there had been some

increase in the number of watchmen, and then a diminution to a fixed number which remained constant during the succeeding week. The testimony is that a certain number of these watchmen were constantly on duty day and night, and there is nothing to show that they were not efficiently discharging their duties at the time of the fire.

Fourth, there was testimony offered that a locomotive had come upon the wharf at 11 o'clock in the forenoon of the day of the fire; that the fire occurred at 6:10 or 6:15 in the evening of November 12th. The claim was made in the brief of plaintiff in error in the Court of Appeals that the wind was blowing from the direction where this engine was towards the place where the fire was discovered; that during the day the wind was blowing from the track toward the centre of the dock and that a spark from that engine might easily have been blown into the shed some time before the fire and smoldered there. The testimony shows that no such thing could have happened. This fire broke out in the upper part of Shed No. 2 and the witness Kerkam, the United States weather observer, shows the direction of the wind all day (p. 119). The testimony of the various witnesses as to the position of the engine—to wit, Ellis, Nie, Lincoln, Reinhard and Stytch, showed that this engine was on the south end of the wharf opposite Hatch No. 3, which the witnesses placed at about the lower end of Cotton Shed No. 1. Kerkam's testimony shows that the wind was blowing from the east or northeast all day. The map plaintiff's Exhibit F shows that the wharf stood nearly north and south. It was therefore impossible for a spark to have drifted from the locomotive from the position in which it is described by the witnesses

against the prevailing wind, almost directly northeast and underneath the shed and into its centre where the fire actually originated. Besides this, there is no testimony that this engine was throwing sparks, or that there was any danger from its location and presence upon the wharf. The testimony of the witnesses that it was frequently there would create the contrary presumption, and that it was not an improper or unusual thing.

With respect to all the foregoing contentions it is a sufficient answer to the argument of the plaintiff in error that not one of them is shown in any way to have been connected or to have had anything to do with the production of the fire and, therefore, they may be laid out of question.

The opinion of WALLACE, J., in the Circuit Court of Appeals, very concisely states the effect of all this evidence as follows:

"As to the second ground of recovery, the case as to the first issue hardly merits discussion. That there were evil disposed persons in the vicinity who might have set fire to the cotton, and that the defendant by keeping a larger force of watchmen at its wharf might have more efficiently protected its property from risk, are facts that may be assumed to be proved by the evidence. But these facts did not prove or tend to prove that the fire was actually the work of an incendiary, and there was not a scintilla of evidence to prove this. On the other hand the place where it was shown the fire started raised a persuasive inference against the theory of an incendiary origin, because it started at the most unlikely and dangerous place for the operations of an incendiary. There was not a particle of evidence to connect the locomotive with the fire. If the fire had started in the cotton which was stored in the vicinity of the locomotive, there would have been one fact of value; but it did not. It does not appear that the locomotive emitted any sparks or dropped any coals. No fact was elicited

to prove that the locomotive engendered risk beyond its mere presence; and seven or eight hours had elapsed after the locomotive was taken away. The case for the plaintiffs as to the negligent origin of the fire rested wholly upon conjecture and speculation."

Upon the trial of the present case, after all the other testimony had been introduced bearing upon labor troubles, presence of the locomotive, crowding of cotton upon the wharf, etc., a witness, Robeau, was called, and the further question is whether upon his testimony there was sufficient evidence of negligence to send this case to the jury.

The contention of the defendant in error is that there was not.

Robeau was a watchman employed by the Boylan Detective Agency, and had been engaged at Westwego prior to the 12th of November for a period of about eighteen days. He was a night watchman, and went on duty at about 6 o'clock in the evening. With him on duty, on the evening of the fire, were other Boylan men, Peake, Schoen, and a watchman in the employ of the Texas and Pacific Railway Company named Valle. Schoen's location was underneath the wharf. Peake's location was in Shed No. 1. Robeau's location was in Shed No. 2, where the fire occurred, and not far from him at the time of the outbreak of the fire, was Valle. On the night of the fire, after Robeau had gone at 6 o'clock to the office of the railway company in the lower end of Shed No 1, and had telephoned to the Boylan office, and had attended to the preliminary work of arranging his lamp and getting the keys for the watchman's clock, and had made the round, as he says, of the dock, he was standing near the lower end of Shed No. 2. He saw the railway

watchman, Valle, pass. In a minute or two, as he says, he heard the crying of "Fire! Fire!" He ran to the woodside of the wharf through one of the gangways and then to the river side, and, as he describes it, in about half a minute he reached the point where the fire had broken out and found Valle with the hose in his hands upon a pile of cotton. In order to reproduce exactly his testimony, it is but fair that we present it in his own words (Direct Ex. p. 153):

"I saw Valle with the hose in his hand, and he says, 'Go down and open the valve.'

"By Mr. Cleveland:

"Q. What did you do? A. I went to open the valve. I could only go sideways. I couldn't hardly stand; and I found the valve wide open. Then I came back and tried to help Mr. Valle with the hose in his hand. Everything was in flames. I couldn't do anything. I tried all my might to have the water, but we could not have any water. The hose was too heavy; we couldn't do anything at all; and he says to me, 'Robeau, go down and untangle the hose,' I says, 'I won't go down where the flame is.' I kept up; that is the only thing I could do. I went to the other end of my beat and took my coat and ran away. * * *

"Q. When you first saw Valle, what was he doing? A. He had the hose in his hand.

"Q. What was he doing with it? A. He couldn't do nothing. When I went down there he told me to go down and open the valve; and so I went and it was wide open.

"Q. When you were down there trying this faucet, and found that it was wide open, did you see any water coming out? A. No, not a drop. We could not have any water.

"Q. You did not see any water when you were opening the valve? A. Yes, I saw the pouring.

"Q. Leaking, you mean? A. Yes.

"Q. When you clambered up with Valle and he had the hose in his hand, what part of the hose did he have in his hand? A. The pipe.

"Q. Was there any water coming out? A. No, sir."

He says further that Valle was trying to have water, but that he could not have any ; that the hose was pretty near where the fire was, against the post ; that it was on the floor of the platform ; that the hose was about six feet high ; and that he tried to pull out the hose to have water to extinguish the flames, but could not because everything was in flames. He says he thinks that about three or four bales of cotton were on fire ; that he was, maybe, two or three seconds trying to untangle the hose ; he says he did not see any barrels of water near that place nor any buckets nor fire extinguishers.

On cross-examination, he says that at most of the posts there was a barrel, and these barrels were filled with water, and that it was a part of his business to look and he did look to see if they were filled, and if they were not filled, he filled them himself. He says on the woodside there were barrels ; there were also buckets. He further says :

" ' I went to the woods again. I went through the gangway and I saw Valle.'

" Q. This hose he had in his hand, you say, do you ? A. He had what ?

" Q. He had the hose pipe in his hand, did he ? A. Yes, he had the pipe in his hand.

" Q. How far was the hydrant from where he was ? A. About 10 feet, but where he was he could not see the hydrant.

" Q. He could not see the hydrant ? A. He was on top of the cotton. He could not see me when I went down neither.

" Q. What did you do when you went there ? A. I went there and saw the valve was wide open.

" Q. The what ? A. The valve of the pipe.

" Q. And was there water in the hose ? A. Kind of water ; yes, in the hose.

" Q. It had pushed out in the hose, had it ? A. Yes, swelled up.

"Q. How far had it pushed out and swelled up in the hose? A. I didn't look. As soon as I saw it open I went to Valle to help him.

"Q. What did you do to help him? A. We tried to pull the hose free, and we couldn't do anything.

"Q. The pressure of the water had kinked the hose? A. Yes, the hose was so tangled that we could not do anything. At the same time the blaze was going on; and Valle says to me, 'Go down and have it untangled.' And I said, 'No, I won't go, go yourself if you want to.'

"Q. And you run away then, did you. A. Yes, I did. I tried to save my skin.

"Q. This cotton was blazing? A. Yes, very high.

"Q. Blazing right up? A. Yes.

"Q. Blazing way up? A. Yes.

"Q. How high was it blazing when you got there? A. About six feet feet from the floor—about.

"Q. How high was the pile of cotton? A. The cotton was piled about 15 feet high.

"Q. Was it blazing along the side of that pile of cotton? A. Yes, spread out.

"Q. Spread out along the ends of the bales, was it? A. Yes.

"Q. Where was this kink in the hose—down below Valle? A. Where the platform was?

"Q. Yes. A. About 6 feet under.

"Q. You say the valve when you tried it was wide open? A. Yes, sir.

"Q. How far out in this hose had the water pushed out from the pipe? A. I don't know that.

"Q. Did you take hold of the hose to see? A. With all my might, all the strength I had.

"Q. And the pressure of the water was so heavy that you could not straighten it out? A. We couldn't budge it.

"Q. Do you know who opened that valve? A. I don't know.

"Q. Do you know how high the fire was when that valve was opened? A. Yes.

"Q. How high was it when the valve was opened—when it was first opened?

"THE COURT: He found it open.

"THE WITNESS: I found it open when I got there.

"Q. You don't know who opened it? A. No, I don't know who opened it.

"Q. How long were you there with Valle when you discovered this fire? A. I never took my watch for that. I did the best I could.

"Q. How long were you there? A. May be two or three seconds; I don't know.

"Q. And then where did you go? A, I went up stairs to help him.

"Q. You went up on the cotton? A. On the cotton.

"Q. How long were you there with him? A. May be one or two seconds.

"Q. Then where did you go? A. I said I tried to save myself. * * *

"Q. How long was it before that fire was spread all over No. 2 Shed? A. How long did the fire last?

"O. How long was it before the fire was spread all over No. 2 Shed? A. About 10 minutes."

This is the substance of the testimony of this witness and the question arises whether upon this testimony there was ground to send the case to the jury. The trial court was inclined to the view that, upon this testimony, the case should go the jury, but after considering the case over night, was of the opinion that the plaintiff's case did not present sufficient evidence to take it to the jury. His reasons therefor fully appear in the direction to the jury (Record, pp. 162-165).

The proposition has been strongly urged in the Courts below that in this case the doctrine of *res ipsa loquitur* applies and the cases of Scott vs. London & St. Catherine Dock Co. and Russell vs. Steamboat Company, a New York case, were cited in support of the contention. We conceive however that such rule can not be applied here, and that the law of this case is announced very clearly in the case of Western Transportation Co. v. Downer, 11 Wallace, 129. The rule is there laid down by Justice FIELD at page 134, as follows:

" The presumption of negligence from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such character that when due care is taken in its performance no injury ordinarily ensues from it in similar cases or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control and for the management and construction of which he is responsible."

After considering the doctrine of Scott vs. London and St. Catherine Dock Company and some other similar cases he says further (p. 134) :

" It is plain that the grounds stated in these cases, upon which the presumption of negligence arises when an accident has occurred, have no application to the case at bar. The grounding of the propeller and the consequent loss of the coffee may have been consistent with the highest care and skill, or it may have resulted from his negligence and inattention. The accident itself, irrespective of the circumstances, furnishes no ground for any presumption one way or the other. If, therefore, the establishment of the negligence of the defendant was material to the recovery the burden of the proof rested upon the plaintiff."

The doctrine of those cases, we insist, can have no application here, but this case must be tested by well-settled rules established in cases of negligence, and that is that the plaintiff must establish the three essentials to a recovery, to wit, (1) the negligent conduct of the defendant; (2) the loss or damage and (3) a direct causal relation between the negligence and the injury or loss. We may concede that the second of these elements is proven in this case. The cotton was burned. That is admitted in the pleadings. As to all the alleged grounds of negligence recited—to wit, the labor troubles, the locomotive upon the wharf, the insufficiency of watchmen, and the improper placing and management of fire apparatus—

there is no neglect shown by the testimony of plaintiffs in error, and nothing whatever by way of connection, as we have already stated, between the alleged negligence and the injury or loss.

If, therefore, there was any connection between any alleged negligence of the defendant in error and the loss, the connection must be found in the conduct of Valle and Robeau. Was the defendant negligent in respect of what occurred, as testified to by Robeau, at the time of the fire? It has been suggested that Valle was a young and inexperineced watchman. There was nothing in the record to show that he was not fully competent to discharge the duties of a watchman upon the dock at Westwego. He had been so employed for some time with the approval of the Boylan police force, who had had experience in matters of that sort for a long series of years. That he was young in years in no way militates against his fitness for a position of this kind. He was prompt, as the testimony shows, to discover the fire. He very promptly gave notice of the existence of the fire.

The testimony shows uncontradictedly that the defendant had an ample supply of water in its tank connected with the pipes leading under the wharf and to the hose connected therewith. The testimony shows that Valle very promptly, and even before Robeau came to him, was endeavoring to use those appliances to put out the fire which had occurred. The testimony shows that the fire broke out within 10 feet of the connection of the hose with the hydrant or standpipe ; that the hose was 100 feet in length. The claim of the plaintiff is that instead of being laid coiled back and forth upon a platform, as the testimony shows that this 100 foot of hose was, it should have

been stretched its full length along and upon a board or continuous platform, and that the failure to have it so arranged is evidence of negligence. The testimony shows that Valle had opened the valve and that the water was pressing into the hose to such an extent that both Robeau and Valle together were unable to straighten the hose so that the water could come through the pipe which Valle had in his hand.

Let us consider these suggestions a moment:

Suppose the hose had been stretched its full length of 100 feet, and that Valle, when he discovered the fire within 10 feet of the connection of the hose and the hydrant, in order to utilize it had run to the valve and opened that and then had run down to the nozzle and brought the nozzle back to the point of the fire; in view of the testimony of Robeau of the rapid spread of the fire who can tell but that the time thus spent would have allowed the fire to gather such a headway as that it would have been utterly impracticable to put it out with any appliances at hand upon the dock? Or, supposing that before opening the valve he had anticipated that which evidently occurred, that the pressure of water would be so strong that he would be unable to pull the hose apart and straight when the water was thus let into it, he had straightened the hose in advance, and then opened the valve and brought the nozzle to bear upon the fire—who knows, and what sort of a guessing match would be instituted here for the jury to say that by Valle's having taken this course the fire could have been extinguished? In other words, assuming that Valle could have anticipated all that occurred, the argument of the plaintiff is based upon the theory that the defendant is bound to anticipate every possible contingency under which

fires may arise, and upon that contingency to arrange its appliances for that purpose. It is true that a short hose pipe might not have kinked, and been found better adapted to this particular fire. But that being so, is the defendant bound to have only a short hose pipe? or to have the short hose pipe in the immediate vicinity of this particular fire? And if so, and a fire occurs out of the reach of such hose, would it not be responsible for not anticipating that condition also?

The argument of the plaintiffs' assumes too much. It assumes that the defendant railway company is bound as an insurer to anticipate all the possible contingencies under which a fire may occur, and to meet and provide for all such contingencies in advance; and, if it fails so to meet them, that it then becomes liable as being negligent or deficient in its discharge of duty. This is to make it an insurer of the property, whereas what it is bound to do is simply to do what a man of ordinary prudence under the circumstances would do. In other words, as the Illinois Central at Southport had its hose 100 feet in length for the purpose of protecting its property, this company, presumably, might do the same, although even the standard of the Illinois Central at Southport is not a standard controlling in the premises.

It was further argued by plaintiffs that comparison of the number of watchmen employed by defendant with the force of the Illinois Central at Southport shows that an insufficient force was employed. But the Illinois Central depended entirely upon the hose and twenty-five fire extinguishers. They had no barrels or buckets. They added to these appliances the extra watchmen. But the record contains clear evidence that extra watchmen with all the appliances of

the City Fire Department added, and the cotton covered with tarpaulins, would not prevent loss. The West India wharf burned in daylight in the city, with extra watchmen, City Fire Department, etc., etc. (Testimony of Sanders, Record, p. 111).

But we insist that the rule laid down by Justice FIELD in Transportation Company vs. Downer applies, and that is that where the loss may have been sustained under circumstances consistent alike with the highest care and skill, or with negligence and inattention, that in such case the burden of proof of showing that it is the latter cause rests upon the plaintiffs. We insist further that looking at the testimony of Robeau fairly, with all the presumptions of diligence on the part of the defendant and of its servants, which the plaintiffs must overcome, that they have not overcome these presumptions, and that the action of the courts below was correct.

Valle may have judged in the hurry and excitement of the circumstances under which he was placed that the most effective method for him to adopt in the utilization of the appliances for the extinguishment of this fire was to do, that which he apparently did do, to wit, take the hose, pull it out so far as he could, and turn the valve on full, in the haste and hurry of the moment, not anticipating that which did happen, a greater pressure of the water in the hose than he had foreseen, thereby entirely choking the flow of the water through the hose. This would be a mistake of judgment in the endeavor diligently and efficiently to accomplish the purpose for which he was set, to wit, the extinguishment of the fire.

This is one hypothesis, at least, which is reasonable upon the testimony of Robeau. To submit the case to

the jury to determine what Valle did before Robeau got there, is, in view of what Robeau states respecting the situation of affairs, to allow the jury to guess as to what occurred; is to allow them to proceed upon conjecture and surmise and uncertainty. If the transaction can be explained upon the theory of an error of judgment, then the plaintiffs are not entitled to go to the jury. If it is equally explicable upon the theory of negligence, or upon the theory of an error of judgment or mistake, they are equally not entitled to go to the jury.

The rule as to the duty of a court to send a cause to the jury is too clearly established by decisions of this Court now to be controverted, and the doctrine, as we understand it, is substantially the same as that which obtains in the Court of Appeals of New York. Both tribunals cite decisions of the other as illustrating the position which they take respecting the duty of the court to submit a case to the jury, or to refrain from thus submitting it. The rule is very clearly put by Justice CLIFFORD in Improvement Company vs. Munson (14 Wallace, 442), quoted with approval in the recent case of Laidlaw vs. Sage (158 N. Y., 76). He says (p. 448):

"Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule—that, in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury

can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."

The rule is further stated by Justice HARLAN in Union Pacific Ry. Co. vs. McDonald (152 U. S., 283), as follows:

"Upon the question of negligence, the case is within the rule that the court may withdraw a case from the jury altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such a conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it."

Del., Lack. & West. R. R. Co. vs. Converse, 139 U. S., 469, 472, and authorities there cited.

Elliott vs. Chicago, Milwaukee & St. Paul Ry., 150 U. S., 245.

Anderson County Commissioners vs. Beal, 113 U. S., 227, 241.

This question of what is negligence or evidence of negligence in a particular case has just been passed upon by the Court of Appeals of the State of New York in a case which presents considerations precisely similar in principle to those which we are now considering in seeking to determine whether the evidence of Robeau showed any negligence on the part of the defendant. In the case of John J. Lewis, an infant, by, &c., vs. The Long Island R. R. Co., appellant, 162 N. Y., 52, the question was presented as to the conduct of the engineer of the defendant and as to whether or not he had acted with due diligence under the circumstances. The following extract from the opinion presents the facts and the conclusion of the court in very clear terms:

"At the conclusion of the principal charge the plaintiff requested the court to charge as follows: 'If

you find that the engineer of the defendant's train, after seeing the horses attached to the tally-ho in which the plaintiff was seated, omitted to do any act which might have prevented the collision or might have lessened the danger to plaintiff, the defendant was guilty of negligence." The court so charged, and the defendant excepted. The appellant now urges that this was error, for which the judgment should be reversed.

"The engineer upon the defendant's train first saw the leaders of the team attached to the tally-ho when the train was about 400 feet from the crossing. It was then running at the rate of 35 miles an hour, and did not he attempt to stop it until he saw the team come upon the track, when he applied the emergency brake and reversed the engine. At the rate of speed at which the train was running only about eight seconds elapsed after he first saw the horses when the collision occurred. Thus he was suddenly confronted with an emergency, having but a few seconds in which to take such precautions as were possible to prevent the accident or mitigate the injury. The acts necessary to stop the train were described upon the trial, and the engineer testified as to what was done. The effect of this charge was to instruct the jury that, if the engineer omitted any one thing which might have prevented the collision or lessened the danger, the defendant was guilty of negligence. This in effect was an instruction that, if the jury should find that any such act was omitted, then, as a matter of law, the defendant was negligent. * * *

"It is often the case that, after a transaction has occurred, the most careful can discover that a different course of action might have prevented a calamity, or at least have mitigated the injury. Still, when an emergency presents itself, and a person is under great excitement from the presence of an impending peril, he may not act with that perfect judgment that he would under other and different circumstances. 'Railways are not liable for a mistaken exercise of judgment upon the part of their servants, * * * to act with the utmost possible promptitude, when the circumstances are such as to afford no time for deliberation' (Patterson's Railway Accident Law, p. 111). Where an employee of a railway company is confronted with a sudden emergency, the failure on his part to exercise

the best judgment the case renders possible does not establish lack of care and skill upon his part which renders the company liable (Wynn vs. Cent. P., N. & E. R. R. Co., 133 N. Y., 575). It is not responsible even for his error of judgment (Bittner vs. Crosstown Ry. Co., 153 N. Y., 76; Stabenau vs. At. Ave. R. R., 155 N. Y., 511)."

The principle as related to the case at bar is brought out clearly in the case of Wynn v. Cent. P., N. & E. R. R. R. Co., cited *ante* in the foregoing quotation. The facts in this case were that a street car was upon a down grade, and running away, when the driver sought to check it by a sharp and sudden application of the brake. The result of the driver's action was, the brake-chain broke, the horses became unmanageable, and the car, after running some distance by the force of gravity, collided with another car standing upon the track, in which was seated the plaintiff, who was thrown from the seat and injured. It was claimed that the driver had not done all that he might have done—that his judgment was at fault in the use of the appliances at his command—that he might have derailed the car by means of the horses, and thus prevented the collision and consequent injury. Upon the trial the case was submitted to the jury upon these questions, and a verdict was rendered in favor of plaintiff upon which judgment was entered, and the General Term of the Court of Common Pleas affirmed this judgment. In the Court of Appeals it was claimed that the driver used more force than necessary in applying the brake, and that this resulted in the accident; the court say:

"The case is without evidence, tending to show that he was not an entirely fit man for the position, and there is the same absence of any evidence tending to

show that he did not use the necessary and proper degree of care and skill at all times upon that trip and up to the time of the collision. When just prior to the breaking of the chain he used the brake two or three times to check the speed of the car on account of the driver of the weiss beer wagon getting on the track in front of him, he says he was entirely unconscious of using any more strength upon the brake than was necessary for the purpose of accomplishing his object. He says it was not necessary and he does not remember that he did. But even if he did use more force than was necessary there was no want of skill in that, and if the chain was as strong as it was intended to be and the purpose of its use called for, there was no harm or injury in such a use. It would be improper to submit the question of lack of skill or of negligence in the driver, based upon evidence that he had used more force in handling the brake than was absolutely necessary to check the speed of the car.

"At any rate, there was no evidence that he did so, and a jury should not be allowed to speculate or indulge in a mere guess upon such a matter. There must be at least some evidence upon which the question of a want of skill can be based, and here there was none. * * *

"It is also alleged that he should have turned his horses out at right angles with the rails and thus have dragged the car across and thrown it off the track. Had he done so and succeeded in overturning the car, considering the speed the car then had, it is quite likely that a worse accident would have occurred and that a charge of unskillfulness or negligence on the part of the driver would have had much to sustain it under such facts. These are, however, but the possible actions which the counsel for the plaintiff thinks now might have been performed by the driver. There is no evidence to show that they would even probably have been effectual. He was confronted with a sudden emergency, and we cannot now say that his action was not the best that could have been performed under the circumstances. Even a failure to exercise the best judgment which the case rendered possible cannot fairly be claimed as evidence of a lack of care or skill."

The Court, therefore, by reason of the erroneous submission of the case to the jury, concludes as follows:

"For the erroneous submission of the question as to the skill of the driver to the jury, the judgment should be reversed and a new trial granted, costs to abide the event."

The court held, as shown by the conclusion of its opinion that the question of the failure of the driver to exercise his best judgment under the conditions could not be submitted to the Jury.

In Bittner vs. Crosstown Ry. Co. (153 N. Y., 76) a case very close in point was considered. The facts in the case were that a boy was knocked down by a car. It was claimed that the motorman in his effort to stop quickly, reversed the action of the motor upon the car and in so doing caused the car a second time to pass over the boy, and that this action of the car by reason of the reversal of the motor caused the death of the boy. This action of the motorman was the principal ground of negligence considered by the Court of Appeals, and the error in the instruction given respecting this phase of the case was considered in the following portion of the opinion by the Court of Appeals:

"The defendant was entitled to have the jury clearly instructed that an error in the exercise of judgment by the motorman would not make the defendant liable for the result in the management of the car in the emergency which occurred after the deceased was struck down, and the charge did not cover that point, or at least not in such exact language as in our judgment would make it perfectly clear to the jurors' mind. To instruct them that, if the motorman was careless in so managing his car as to run back upon the boy, the plaintiff might recover, was not the clear equivalent of the instruction that if the motorman erred in judgment after the car

struck the boy, the defendant would not be responsible for that error of judgment. The evidence in the case would have warranted the jury in finding that the deceased was guilty of contributory negligence in placing himself directly in front of the car and that the motorman was not guilty of negligence in striking him. If they should have reached that conclusion and were brought face to face with the subsequent situation after the boy had been knocked down and run over, they could only return a verdict for the plaintiff upon the basis of some act of negligence then occurring on the part of the defendant's servant, the motorman, by which the accident was aggravated. If they could believe the evidence of the witness Toms, that the car had passed so far beyond the boy and then, while he was still alive, was backed down upon him and again was sent over him, they could, perhaps, say that the motorman was careless in the management of his car at the time and that through such carelessness the boy was in fact killed. But if they believed that the motorman was endeavoring, in the exercise of his judgment, to prevent injury to the boy, then there was no carelessness on his part, but merely an error of judgment, for which the defendant could not be held responsible. Upon the evidence it appears that the motorman was confronted with a sudden emergency, and it should have been distinctly stated to the jury that if, in what he did, he used his judgment, the defendant was not responsible, even if it was an error which brought about the lamentable result claimed. Even the failure to exercise the best judgment would not be evidence of negligence."

This case was followed by Stabenau vs. At. Ave. R. R. Co., in 155 N. Y., 511. This was also the case of an electric car, in which it was claimed the motorman in charge of the car had not applied the brake sufficiently quick to prevent running over the child attempting to cross the track, and also because he had used the brake instead of some other appliance upon the car used to govern electric motive power. It was claimed that if he had used the other appliances upon the car instead of attempting to stop the car by the brake, the

girl's life might have been saved, and that, therefore the company was responsible. Upon this point the Court of Appeals say (p. 515):

"Nor can negligence be predicated upon the use by the motorman of the brake, instead of the particular appliance used to govern the electrical motive power. In the emergency one of two courses was open to him, and it is impossible to say that the one adopted was not as effective as the other under the circumstances. It appears by the evidence that a sudden reversal of the electric power sometimes operates, as the plaintiff's witness said, 'to blow out the fuse;' in which case, the power to control is lost. The motorman testified to having heard of that happening often. Whether the one or the other means provided for stopping the car should have been adopted was a matter for the exercise of the motorman's judgment, and, though newly employed, he was not shown to be incompetent. For an error in its exercise the defendant could not be held responsible. Even the failure to exercise the best judgment would not have been evidence of negligence."

The same principle is approved in the case of Union Pacific Railway Company vs. McDonald, 152 U. S., 262.

Justice HARLAN says (p. 281):

"The authorities cited, indeed all the adjudged cases—agree, as declared by the Court of Appeals of New York, that in applying the rule that a person who seeks to recover for a personal injury, sustained by another's negligence, must not himself be guilty of negligence that substantially contributes to the result, the law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care to be reasonably expected in view of his age and condition (Reynolds vs. N. Y. Central, &c., Railroad, 58 N. Y., 248, 252). And so, as declared by the same Court, persons in sudden emergencies, and called to act under peculiar circumstances, are not held to the exercise of the same degree of caution as in other cases (Thurber vs. Harlem Bridge, &c., Railroad, 60 N. Y., 326, 336)."

See, also,
Banks vs. H. St. Ry. Co., 136 Mass., 485.
Bell vs. H. & St. Jo. R. R. Co., 72 Mo., 50–60, 61, 62.

The plaintiffs in the lower courts insisted that they were entitled to go to the jury because their testimony left wholly uncertain the causes of the condition of the hose at the time. The defendant insists that, precisely because the testimony left this cause of the hose thus uncertain, is a clear reason why the case should not have been sent to the jury. The testimony left it to the jury to guess as to whether or not the condition of the hose might not have come from Valle's error of judgment in turning on the water before he stretched the hose or before he laid the hose in such a way as to prevent the pressure from pushing its coils into each other, or whether it occurred from the accident of pulling the whole coil of hose off of the platform, and not observing it before he turned the water on, or on any of the other possible hypotheses upon which the condition of the hose may be explained. It is not incumbent on the defendant to explain which of these possible hypotheses is the true one, but it is the duty of the plaintiff in order to be entitled to go to the jury to produce some testimony tending to show, under the rule announced by Justice FIELD in Transportation Co. vs. Downer, that this condition of the hose was occasioned by the neglect of the defendant. The fact that the hose was tangled does not help the plaintiffs. How and when did it become so? Was it thus tangled by Valle's efforts to use it, or prior thereto? Was such result produced by the water pushing into the coils when the valve was opened? Where is any testimony by which a jury can do aught

but conjecture as to any of these queries. But it is not permissible to send a case to the jury to guess out the result.

As to the right to send a case to the jury under such testimony for the purpose of conjecturing and guessing as to the cause of a certain state of facts, the case of Improvement Company v. Munson (14 Wallace, 442) is quite clear that there must be more than a mere scintilla of proof ; that there must be something definite upon which the jury can proceed in order to justify the submission to it.

The opinion of Union Pacific Railway Company vs. McDonald (cited *ante*) established the same duty of the Court, because in that case it was attempted to insist upon certain conjectures respecting the conduct of the plaintiff which it was claimed amounted to contributory negligence.

The New York Court of Appeals had occasion to consider this whole question as to what is proper to submit to a jury in the recent case of Laidlaw vs. Sage (158 N. Y., 76), in which the plaintiff claimed that, although the defendant was not responsible to him for the consequences of an explosion caused by a third party in the defendant's office, yet he was entitled to recover for the injuries which he sustained by reason of his being unlawfully moved from one position in the office to another by the defendant. The testimony in the case showed that the explosion of a quantity of dynamite had entirely wrecked all parts of the office, a large room 30 by 26 feet, and injured persons in different parts of the office. The contention of the defendant was that to send the case to the jury upon the question of whether the plaintiff was injured more in

a particular spot than he would have been 18 or 20 inches to the right or left of that spot was to give the jury nothing but the merest conjecture, guess, or speculation. On the part of the plaintiff it was claimed that there was some testimony as to the lines of explosion, the fractures of the beams or joists in the floor of the office, and some matters of that sort which would entitle the jury to find that the plaintiff would have been less hurt if allowed to remain at the place where he was standing before it is claimed the defendant moved him, than he was hurt at the place to which the defendant moved him; and upon the submission of the evidence to the jury, the jury rendered a verdict of $40,000 in favor of the plaintiff. Upon this point, after citing a large number of authorities, at page 97 the court says:

"Thus we see that this court has, in a long line of decisions uniformly held that to justify a submission to the jury of any issue, there must be sufficient proof to sustain the claim of the party upon whom the onus rests, and that mere conjecture, surmise, speculation, bare possibility, or a mere scintilla of evidence, is not enough. When the principle of these cases is applied, it becomes obvious that the court was not justified in submitting to the jury the question whether the plaintiff suffered any substantial damages by reason of his having been moved in the manner claimed, even though it should find the defendant moved him. No one can read the evidence in the record as to the nature, power and effect of the explosion, and the results that followed, without reaching the conclusion that it utterly failed to show that the plaintiff was more seriously injured than he would have been if he had remained where he claims to have first stood. Indeed, we can find no proof sufficient to justify the conclusion that there was any place of safety, or comparative safety, in any of the rooms occupied by the defendant. The explosion swept with terrific force over them all, destroying or seriously injuring every person or thing with which it came in contact. Under such circum-

stances, to permit a jury to guess or conjecture that the plaintiff's injuries were more serious or severe than they would have been if his position had not been changed, is, in the language of Judge GRAY, 'to withdraw from the litigant a safeguard intended for the protection of his rights.' We think the court erred in not directing a verdict for the defendant, at least so far as substantial damages were concerned, upon the ground that there was no sufficient proof that the plaintiff sustained any injury in consequence of the alleged conduct of the defendant."

Some of the cases cited by the Court of Appeals in this opinion are of value on the precise question we are considering here, because the New York Court of Appeals, upon the subject of the duty of the court as to the submission of a case to a jury, is exactly in line with this Court upon that question.

Thus, in Baulec vs. N. Y. and Harlem R. R. Co. (59 N. Y., 356), the question involved the liability of the defendant for the action of a switchman who was claimed to have been incompetent. The testimony was that on one prior occasion a similar alleged act of negligence had been committed by him and the testimony tended to show that the general superintendent of the defendant had investigated this accident and concluded that it was not the fault of this switchman. Notwithstanding this, upon trial a nonsuit was ordered against the plaintiff. An appeal was taken to the Court of Appeals, and the court (p. 365), through ALLEN, J., says :

" I am clearly of the opinion that there was not sufficient evidence to carry the case to the jury. A verdict against the defendant based upon this evidence would have been against evidence. Such being the case, it was the duty of the court to nonsuit. This case is reported upon a former trial (5 Lansing, 436), and the decision there made is quoted with apparent approval by Mr. Wharton in his recent treatise

on the law of negligence, and the principle there decided makes a part of the text of section 238 of that work. It is not enough to authorize the submission of a question, as one of a fact, to a jury, that there is "some evidence. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, would not justify the judge in leaving the case to the jury" (per WILLIAMS, J., Toomey v. Railway Company, 3 C. B. (N. S.), 146). The same learned Justice adds that every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. In another case it is held that a judge will not be justified in leaving the case to the jury when the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant. In such case the party affirming negligence has altogether failed to establish it, and EARLE, C. J., says, "that is a rule which ought never to be lost sight of" (Cotton v. Wood, 8 C. B. (N. S.), 568). This rule applied to this case leads to an affirmance of the judgment, for it cannot be denied that the evidence is as consistent with the idea that the defendant did carefully investigate the occurrence of which evidence was given, and with proper prudence and in the exercise of due care continue McGerty in its employ, as that they were negligent in the performance of that duty and carelessly or imprudently retained him with knowledge that he was not a proper man for the position. At most the jury could only conjecture that the defendant might have been waiting in the care and caution proper to be exercised in such a case, and if so the case was properly withheld from the jury" (Avery v. Bowden, 6 E. & B., 973, 974; McMahon v. Lennard, 6 H. of L. Cases, 970, 993).

In Bond v. Smith (113 N. Y., 378), the question was again considered upon a case where the plaintiff's intestate was found in an open area belonging to the defendant adjoining an alley which was faced with a stone coping. The alley was used by persons having business with the rear of the buildings, and the plaintiff's intestate was found in the area where he had fallen

during the night. How he happened to fall was unknown. The defendant insisted that a nonsuit should be granted, while the plaintiff insisted that under all the facts he was entitled to go to the jury. He was permitted to go to the jury, and a judgment was rendered in favor of the plaintiff and an appeal taken to the Court of Appeals from this judgment. EARL, J., examining the case upon the question says (p. 385):

"How, then, did the accident happen? How came he to fall over this stone coping into this known place of danger? The evidence does not tell us. It is an unsolved mystery. No plausible theory can be suggested to account for it. It is, however, plain that he could not have fallen into it while passing along the street. He must have departed from the street and thus have gone over the stone coping. It is impossible to conceive how he could in the exercise of ordinary care and prudence have fallen into it. We have no right to guess that he was free from fault; it was incumbent upon the plaintiff to show it by a preponderance of evidence. She furnished the jury with nothing from which they could infer the freedom of the intestate from fault. She simply furnished them food for speculation, and that will not do for the basis of a verdict. The law demands proof and not mere surmises. The authorities are ample to show in such a case the plaintiff should have been nonsuited."

In Pauley vs. Steam Gauge and Lantern Co. 113) N. Y., 90), the question was likewise considered. In this case the action was to recover for the death of plaintiff's intestate in a fire which occurred in defendant's factory. It was claimed that the defendant had neglected to comply with the act respecting the construction of fire escapes. There was considerable controversy in the case as to whether or not the defendant had complied with the statute. The testimony did not define the manner in which the intestate lost his life save that he was in the building and burned with a

large number of other persons. There were various groups of bodies of the dead at different points in the building, some of whom it was claimed were left to be suffocated by the smoke or destroyed by the fire by reason of the alleged want of proper location of the fire escapes. The position in which the intestate's body was found left it uncertain whether he had fallen to that point with the floors or whether he had crawled into that position from a certain chute. Upon this state of the testimony a nonsuit was granted at the trial and the General Term granted a new trial on the exceptions. In the Court of Appeals, FINCH, J., says:

"The evidence, thus so far from tending to sustain the theory of the complaint, tends only to disprove it, and no judgment founded on it can be sustained.

"But the respondent and the General Term insist that some other theory may be adopted, and in order to do so, enter upon the realm of conjecture, and ask that a jury, in the utter absence of proof, may be allowed to guess that there was some negligence on the part of the defendant which might have tended to cause the death of the intestate."

After considering various theories respecting the manner in which the accident might have happened, the opinion proceeds:

"A mere conjecture built upon a bare possibility will not suffice to transfer the money or property of one man to the possession or profit of another. As we said in Bond vs. Smith (113 N. Y., 378), food for speculation will not serve as the basis of a verdict."

In Linkauf vs. Lombard (137 N. Y., 417), the Court re-announced the same rule, where a shipping contract was made by the plaintiff with a person who signed himself as agent. There was no such steamship company incorporated, but the steamship enterprise was

conducted by the manufacturing corporation which had no power to engage in such an enterprise. The defendants, as officers of that corporation, had the entire management and unlimited control of the business. The steamers were chartered by agents of the corporation. All moneys received were paid to and all expenses incurred paid by it. The Court submitted to the jury the question of the liability of the defendants, which rendered a verdict in favor of the plaintiff and judgment was entered and the same affirmed at General Term. The Court, however, reversed the judgment, saying:

"At most it was only open to surmise that the defendants were individually concerned in running this steamship line and that was not enough to justify the trial judge in letting the case go to the jury. To permit a jury to speculate and surmise upon the question of responsibility is to withdraw from a litigant a safeguard intended for the protection of his rights. He is entitled to the judgment of the Court upon questions to which the character of the evidence admits of but one answer. No such possibilities of a failure of justice should be countenanced. In the case of Improvement Co. vs. Munson (14 Wall., 442) Justice CLIFFORD well said: "Nor are judges any longer required to submit a question to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that, if there was what was called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury; but recent decisions of a high authority have established a more reasonable rule: that in every case before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the *onus* of proof rests."

"The rule should be regarded as settled under all the authorities, as well by the decisions of the courts

of this State as by those of England, that where there is no evidence upon an issue before the jury, or the weight of the evidence is so decidedly preponderating in favor of one side that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit, or to direct the verdict, as the case may require. Reference to the following cases will suffice (Rudd vs. Davis, 3 Hill, 287; 7 id., 529; People *ex rel.* Peck vs. Board of Police, 35 Barb., 651; Herrick vs. Hoppock, 15 N. Y., 409; Wilds vs. R. R. Co., 24 *id.*, 430; Corning vs. Troy, etc., Factory, 44 *id.*, 577; Neuendorf vs. Insurance Co., 69 *id.*, 389; Dwight vs. Germania Ins. Co., 103 *id.*, 341; Schofield vs. Railway Co., 114 U. S., 615–619; Gunther vs. Ins. Co., 134 *id.*, 110, 116; Met. R. Co. vs. Jackson, 3 App. Cas. L. R., 193, Lord BLACKBURN'S opinion)."

The testimony of Robeau and the facts therein stated come within the principle suggested by Justice FIELD in the opinion in Western Transportation Co. vs. Downer that where the facts are as consistent with care and diligence on the part of the defendant and its servants, as they are with the negligence and inattention of the defendant, the case must not be submitted to the jury, because it would be a mere conjecture for the jury whether the loss was the result of negligence, or was the result of accident. In the case of Baulee vs. N. Y. & Harlem Railroad Co., cited *ante*, the rule is definitely stated as follows:

"It is the settled principle in the law of negligence which it has been said should never be lost sight of, that, when the plaintiff's evidence is equally consistent with the absence as with the existence of negligence, the case should not be submitted to the jury, since in such a case the evidence fails to establish the essential fact."

This principle was cited with approval in the case of Ruppert vs. Brooklyn Heights R. R. (154 N. Y., 94); but it is also said in this latter case, in order to prove

a fact by circumstances, there should be positive proof of the facts from which the inference or conclusion is to be drawn. The circumstances themselves must be shown and not left to rest in conjecture, and when shown it must appear that the inference sought is the only one which can fairly and reasonably be drawn from the facts (People vs. Harris, 126 N. Y., 429).

The same principle is applied in the case of Cadwell vs. Arnheim (152 N. Y., 182), in which a runaway team attached to a coach caused some damage, and in which the opinions of experts were put in evidence tending to show that the defendant's coachman ought to have controlled the horses and prevented the injury. The coachman testified as to what he did respecting the team, and as to the cause of the accident, which was something for which the defendant was not responsible. The case was submitted to the jury and resulted in a verdict for the plaintiff and an affirmance by the General Term of the judgment entered upon the verdict and the defendant appealed to the Court of Appeals. Upon this the court say:

"In the course of the affairs of life accidents must happen, and if they are not attributable to the breach of some legal duty owing to the sufferer he is without legal right to complain. In actions for the recovery of damages charged to the negligence of a defendant it must appear that there has been some breach of duty on his part, or of those towards whom he stands in the position of a master, and affirmative proof must be given which shows or tends to show the negligence of the master or servant. It will not do to submit the question of negligence to a jury where the facts are equally consistent with the presence or absence of negligence, or where the jury could do no more than surmise as to the negligence of the defendant."

In Laidlaw vs. Sage, cited *ante*, the doctrine of Ruppert vs. Brooklyn Heights R. R., cited above, is quoted with approval, and the rule is stated, as follows:

"When the damages claimed in the action are occasioned by one of two causes, for one of which the defendant is responsible and for the other of which he is not responsible, the plaintiff must fail if the evidence does not show that the damage was produced by the former cause, and a jury must not be left to mere conjecture; and a bare possibility that the damage was caused in consequence of the act of the defendant is not sufficient." Citing Searles vs. Manhattan Ry. Co., 101 N. Y., 662; Ring vs. City of Cohoes, 77 N. Y., 83; Taylor vs. City of Yonkers, 105 N. Y., 202; Ayres vs. Village of Hammondsport, 130 N. Y., 665; Grant vs. Pa. & N. Y. Canal & R. R. Co., 133 N. Y., 657.

This is, however, only a variation of the rule that the plaintiff must fail, unless he shows (1) negligence, (2) loss, directly resulting from such negligence. All presumptions favor the defendant charged with negligence, and the plaintiff must overcome these presumptions by excluding any reasonable inference from the evidence, except that of negligence. This the plaintiff in this case has not done.

The testimony must not admit of any other reasonable hypothesis than that of negligence of the defendant respecting the cause of the loss, and must be more consistent with that theory than with any other. If it is equally consistent with the theory of accident, or that of a mistake of judgment on the part of the defendant's employees, then the case should not be permitted to go to the jury. This was a case of that character in all respects, and the action of the court in refusing to send the case to the jury and in directing a verdict for the defendant was right and should be affirmed.

Respectfully submitted,

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No. 86.
Suppl. Brf. of Taggart & Masten for P. & E.

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No. 86.

LOUIS AUGUSTE MARANDE, JULES EMILE ROEDERER and PAUL LEON ROEDERER,

Plaintiffs in Error,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

Supplemental Brief of the Texas and Pacific Railway Company.

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OCTOBER TERM, 1901. NO. 86.

LOUIS AUGUSTE MARANDE, JULES EMILE ROEDERER and PAUL LEON ROEDERER,
Plaintiffs in Error,

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THE TEXAS AND PACIFIC RAILWAY COMPANY.

SUPPLEMENTAL BRIEF OF THE TEXAS AND PACIFIC RAILWAY COMPANY.

Our brief filed in this case was prepared before we had an opportunity to examine the brief of the plaintiff in error, and therefore to notice and correct some very material references in that brief to the testimony in the case. We therefore now take the opportunity in this supplemental brief of alluding to certain statements respecting the testimony and correction of what we deem to be material errors of fact.

I.

In the statement of facts and in the argument it is alleged that the fire by which the wharf was consumed broke out within a few feet of the place where the locomotive was upon the wharf the day of the fire (Brief, pp. 6–30). This is exactly contrary to the testimony, and contrary to the finding of the Circuit Court upon the trial of the case. The wharf stood upon the bank of the river nearly north and south. The upper or north shed was the one in which the fire broke out, and the fire occurred in the upper part of this north shed near the north end of the wharf (Robeau's testimony, pp. 152, 160; Gassenberger, p. 113). The steamship "Malabar" was loading opposite the lower end of No. 1 Shed, or the south shed, six or seven hundred feet further down the river near the south end of the wharf, and was lying with her bow upstream, No. 3 Hatch being near the stern of the vessel. The testimony of the witnesses cited, *post*, indicates that the locomotive was on the wharf in the neigborhood only of No. 3 Hatch. Thus, Ellis says (p. 87): "I saw that locomotive just a little past No. 3 Hatch."

Nie says:

"Near 12 o'clock, a locomotive came on the wharf and she passed up by No. 3 Hatch. About how far up she did go I don't know, but she passed the hatch where I was working; she passed right in front of the hatch. The distance may be ten feet, or it may be fifteen or twelve, something like that. I don't know exactly the measurements, but I couldn't help noticing it because we stopped work when the locomotive came up. The trucks couldn't get in. I went off to dinner and when I came back she had gone. How long she stayed I don't know. I am positive that that engine was there that day. She had some cars with

her and she passed on by the No. 3 Hatch. I am sure of that. The engine itself passed there" (Record, p. 89).

As to the position of the Malabar, the same witness locates it as hereinbefore stated (Record, p. 80). On cross-examination, he is unable to state whether there were ten or fifteen cars that were being pushed up ahead of the locomotive (Record, p. 91).

Stytch says:

"I saw the engine on the wharf and the cars abreast of the No. 3 Hatch, where I was working. She was right abreast of No. 3 Hatch when I saw her" (Record, p. 92).

On cross-examination, he says:

"There were a good many cars with her. The engine was right abreast of No. 3 Hatch. The cars were ahead of the locomotive up the wharf. The engine was headed up the wharf and was pushing the cars up. I couldn't say how long the engine stayed there. They were unloading the oil cake a little above No. 3 Hatch" (Record, p. 93).

On further examination, he says:

"Q. Did you see the engine as far as it went? A. I only saw it going toward that No. 3 Hatch.
"Q. Where did she stay? A. She stayed there.
"Q. Didn't she go in higher? A. No, sir; she stopped there" (Record, p. 94).

John Reinhard says:

"I seen a locomotive on the wharf right abreast of No. 3 Hatch" (Record, p. 95).

On cross-examination, he says;

"This No. 3 Hatch was right even with the cotton shed, the lower end of the cotton shed down town. No. 3 Hatch was right even with the lower end of the shed. * * * This No. 3 Hatch was right even

with the cotton wharf—right even with the lower end of the cotton wharf" (Record, p. 96).

The testimony thus very conclusively shows that the statement that the locomotive was within a few feet of the place where the fire broke out is pure fiction. This also clearly appears from other considerations. The uncontradicted evidence shows that not less than 10 cars were attached to the engine which it was pushing upon the wharf for the purpose of unloading. These cars would prevent the engine from approaching at least within the space covered by them to the upper end of the wharf, and this space covered by the cars would amount to from 300 to 350 feet of the upper end of the wharf. In addition to that, the testimony of Miller (p. 19), is that the sheds on the wharf were from 250 to 300 feet wide, and the track on which these cars ran was in front of the shed and between the shed, and the river. The testimony of Robeau is that the fire broke out within 10 feet of a hydrant. And in the upper part of the upper shed (Record, p. 158). Miller's testimony is that the pipe ran along the centre of the sheds and three hydrants were attached to the pipe in each shed (Record, pp. 18, 20). Presumably they were spaced at equal distances so the 100 feet of hose could be used most effectively. This would bring the fire well up to the upper end of the shed, for it would locate the fire near the upper hydrant. Therefore, the uncontradicted testimony, even conceding all the legitimate inferences that can be drawn from the evidence, places the locomotive that was upon the wharf on the day of the fire from 200 to 400 feet from the place where the fire broke out, and entirely outside of the shed. Furthermore, the locomotive was in a

southeasterly direction from the place where the fire broke out, while the direction of the wind was either from the east or northeast all that day, particularly from eleven o'clock in the forenoon, when the engine was there, until night (Testimony of Kerkam, Record, pp. 119, 120).

The statement is further made in the brief that the Circuit Court, in its opinion, overlooked altogether the testimony that the locomotive was in the habit of going on the wharf in the evening and hauling out the empty cars and placing in full ones, so that the men could go to work in the morning with full cars awaiting them (Brief, p. 6). The citation to the testimony is to that of Coffey (Record, p. 74), The context, however, clearly shows that, where he speaks of the engine taking out in the evening cars that had been unloaded, it is with reference to cotton cars, none of which were placed upon the wharf track at any time, but all of which were placed on the tracks in the rear of the wharf, and that the testimony has no relation to the track which was occupied by the cars and the locomotive on the day in question (Testimony of Coffey, Record, p. 74).

In addition to that, there is no testimony from any witness suggesting that, on the evening in question, the locomotive ran upon the wharf or was anywhere near the wharf; and, although Coffey, Trainor and Lecorgne and a number of other witnesses were called, and examined respecting the situation of affairs at the dock on the evening in question, not one witness was interrogated upon the presence of the locomotive near the wharf on the evening of the fire, nor was it suggested by any one that any locomotive was anywhere near this wharf at any time after 12 o'clock on the

12th of November. In addition thereto, as the Circuit Court and the Circuit Court of Appeals found, there is not a particle of evidence to connect the locomotive with the fire in any respect (Record, pp. 163, 200). The testimony does not disclose that the locomotive emitted any sparks, or dropped any coals, or that it was likely to do so. On the contrary, the testimony tends to show that its coming on the wharf in the manner it did this day was a usual and customary thing, and thus tends to disprove the likelihood of its emitting sparks, or being in any sense a source of danger to the cotton.

II.

The further suggestion is made in the brief that a "secret" understanding or peculiar contracts, made by the railway company with the steamship companies, was the cause of the accumulation of cotton at Westwego; that under these contracts the steamship companies were under no obligation to take delivery at any special or reasonable time, and that the delay in the arrival of vessels at New Orleans placed the steamship companies under no legal liability to the defendant (Brief, p. 25). This statement seems to us a complete misconception of the relation of the railway company to the shippers of cotton, as well as of the relations of the steamship companies to the railway company and to the shippers of cotton under the arrangements which were shown in the evidence in this case. The assumption underlying this statement in the brief is that under shipments such as those in

question in this case the railway company had entered into an obligation with the shipper to carry this cotton from the point of shipment to the point of destination, and that the steamship companies were a mere agency which the railway company could look to for carrying out that part of its undertaking, covering the route from New Orleans to Havre, and that the shipper could look wholly to the railway company for the performance of the entire undertaking. The testimony in this case justifies no such assumption. In the first place, the bill of lading which is the contract with the shipper, is simply an undertaking by the railway company to carry over its own line, and then to deliver to a certain designated steamship line, which was thereupon to carry the same to the point of destination (Bill of Lading, Record, p. 169. Insurance Co. vs. Railroad Co., 104 U. S., 146, Myrick vs. Railroad Co., 107 U. S., 102). If these bills of lading had been issued without the knowledge or consent of the steamship company, possibly the claim of the plaintiff in error, that the steamship company could accept or refuse to accept this cotton as it pleased, might have some foundation. But when we turn to the testimony in the record we find that the steamship company had authorized the railway company to issue these bills of lading in this form to the shipper, by first entering into engagements with the railway company to take cotton from New Orleans to European ports at certain prices, knowing that, upon these engagements, bills of lading would be issued of the character in question in this case. This is clearly shown by the testimony of the steamship agents called, all of whom testified that engagements of this character were made by their lines

with the railway company, knowing that the railway company would, upon such engagements, go into Texas and arrange for shipments of cotton, and issue through bills of lading on behalf of the railway company or companies and the steamship company, and that under such engagements they would send their steamers to Westwego to receive the cotton (see testimony of Warriner, Le Blanc, Hammond, Ross andSanders, cited *post*, pp. 14–21). The bill of lading in this case was thus issued, based upon an engagement with Elder Dempster & Co. (Record, pp. 76, 174, 176).

The suggestion, however, seems to be that, where the statement is made on these engagements, "delivery unrestricted," the steamship companies were at liberty to take this cotton whenever they pleased, and it is claimed that the testimony establishes this fact. The only testimony upon this subject which we are able to find in the record is the following:

"Q. Was any time specified or understood between you and the Texas & Pacific Railway Company at which you should go to Westwego to receive cotton after it arrived there? A. No. The delivery on both sides was unrestricted.

"Q. Did the Texas & Pacific Railway Company give you any notice that you were bound to take or receive cotton at or within a specified time? A. No. There was never any complaint made to me by the Texas & Pacific Railway Company that I did not receive cotton on time that I know of" (Testimony of Warriner, Record, p. 41).

The only other witness upon the point is Sander's testimony as follows:

"Q. Please tell me what, in 1894, among the shippers and merchants centering in New Orleans, the words 'delivery unrestricted' meant. A. This is a peculiar form of delivery which is used only by the Texas & Pacific Railway Company and certain connec-

tions of theirs in Texas. The usual form of engagement note calls, as a rule, for a certain date of delivery to the vessel. The Texas & Pacific Railroad and certain connections, for many years, have used the unrestricted term, because they did not desire, as I understand it, to be held to deliver cotton at any specified date, and it has always been understood that the rule must work both ways; in other words, the railroad was not bound to deliver the cotton by any particular date, nor was the steamer obliged to take delivery of the cotton at any particular date. The restriction as to actual time has never been definitely settled. It might mean unrestricted for the whole term of the season."

On cross-examination, he further says:

"Q. You say this term, 'unrestricted,' was used only in T. & P. contracts of this character of engagements. A. My recollection is that it was used until possibly quite recently only by the T. & P. road and their connections. Now, there is a modification somewhat in this season and possibly last season. I think I am correct in saying that in 1894 only that road—I would like to qualify that if you will permit me. There are some of the connections of the T. & P. road, for instance, the Southern Pacific Company and other possible connections. The Southern Pacific road brings in cotton on such engagements as this, and the T. & P. road, as I understood, for reasons of its own, declined to enter into engagements in a great many cases to deliver at any particular time. The inference unquestionably was that the other party was entitled to the same right as to reception of the cotton. I never knew the Texas and Pacific to controvert that inference.

Q. Isn't it a fact that in conversations that Mr. Miller has insisted that the Texas and Pacific would not assent to that arrangement and insisted on the immediate reception by your own steamship line of the cotton when it arrived? A. I cannot say. Mr. Miller may have said so; but it certainly had no effect. We would certainly never dream, of course, of making an engagement which would be binding on one and not on the other. I could not say positively in regard to that; it may be so practically, of course it has been without result for the obvious reason that we could not agree to it" (Record, pp. 109, 110).

This is all the testimony in the case aside from the language of the contracts or engagements themselves (Record, pp. 176 and 177), and we respecfully submit that neither the testimony nor the language of the engagements justifies the suggestion inserted in the brief at a number of points that there were secret understandings and arrangements between the railway company and the steamship companies, relieving the steamship companies from any obligation to take this cotton promptly, and as a result that it accumulated upon the railway company's wharf. The form of engagement we think justifies exactly the opposite conclusion, so far as it has any bearing upon the subject at all. It is headed "Texas and Pacific Railway Company," and is addressed to the agent of the steamship lines, being in the nature of a letter, advising the steamship line that the railway company has engaged a certain number of bales of cotton for shipment by a particular steamship line at a particular rate, "delivery unrestricted." The testimony of Miller, the agent of the railway company, was that this engagement of a rate for a certain number of bales of cotton with the steamship line preceded the shipment of that cotton under through bills of lading by the railway company from points in Texas (Record, p. 22). This engagement, therefore, it is to be observed, is in effect an authorization by the steamship company to the railway company to make arrangements with shippers along its lines of railway for shipments, on through bills of lading, of cotton, at a through rate, to the amount of bales named in such engagement with the railway company. The knowledge of the steamship companies of the shipments under the through bills of lading, based upon the engagements made with them for the

ocean rate, would bind the steamship companies to receive and carry the cotton as contemplated by the provisions of the bills of lading. The delivery referred to in the engagement, evidently relates to the transfer of the cotton from the railway to the steamship line. This is in no sense a delivery by the steamship line. It is a receipt by the steamship line.

The effect of the construction contended for by the plaintiff in error is this: the engagement between the railway company and the steamship company requires the railway company under the authorization in the engagement to go into Texas, and make shipments of cotton under through bills of lading, with the knowledge and acquiescence of the steamship company, and in which the steamship company is named as the party bound to receive this cotton at the terminus of the railway, and thence to carry it to the destination; but, because the term "delivery unrestricted" is employed in the engagement between the railway company and the steamship company, the railway company alone is bound under the provisions of the bill of lading, while the steamship company is at liberty to receive this cotton at whatever time it pleases at the terminus of the railway, notwithstanding all the implications and provisions of the bill of lading issued with its consent, and based upon its engagement with the railway company. This, it seems to us, is to give a meaning to the term "delivery unrestricted" utterly unwarranted by any suggestion contained in the meaning of the term used, and utterly at variance with the whole course of business between the parties, and wholly contrary to the duties imposed upon the parties, under the circumstances and the course of business, by the terms of the bill of lading.

The fact that Mr. Sanders and Mr. Warriner drew the conclusion, or understood that the rule must work both ways, or held that the inference unquestionably was that both parties had that right, in no way establishes such a meaning to the engagement. Such inference, we think, contradicts the express terms of the engagement itself, which simply provides that the railway company is under no obligation to secure the shipment of this cotton under these bills of lading at such times that the cotton should reach Westwego at any particular period wfthout changing the duties of the carriers under the bills of lading. The bills of lading were issued on behalf of the steamship company as well as on behalf of the railway company or companies. In view of the testimony of the steamship companies' agents this was authorized and made them parties to the bill of lading and bound by their provisions (see Testimony of Warmier, Hammond, LeBlanc, Ross and Sanders). If the delivery were restricted, it would be that the railway company was obligated, during the month of October, if such were the expression on the engagement, or during the month of November, bring the cotton there, and deliver to the steamship. Such an engagement is found in the record, page 23. Under such an engagement we see no reason why it might not equally be claimed that the steamship company was at liberty to take its own time with respect to the receipt of the cotton as under the engagements involved in this case.

III.

The claim is made in the brief that there was not an established custom by which "Westwego" was included within the "port of New Orleans" as commercially understood, and, therefore, there was no right to carry the cotton to that place for delivery to the steamship company. This position ignores certain testimony in the case, and presents too narrow a view of the situation of affairs at Westwego and New Orleans. It ignores the fact that it was the universal custom that had obtained for many years, as testified to by the steamship agents, to transfer export cotton shipped on through bills of lading to the steamship companies at the terminals of the various railways. This custom obtaining with respect to railway shipments generally at New Orleans, it was not material whether the shipments by the particular point "Westwego" was long continued or not. Such shipments by this particular point would be like the addition of a new dock to the dockage facilities in Brooklyn, under such facts as obtained in the De Vato case, where it was already a universal custom for vessels consigned to the "port of New York" to unload at Brooklyn. This custom at New Orleans was clearly established as shown by the testimony which we shall presently call attention to. In accordance with this universal custom, the Texas and Pacific Railway Company, early in the year 1893, established this terminal point at Westwego for connection with the various steamship lines, and thereafter, as the testimony uncontradictedly shows, it was the sole point of receipt by the steamship lines, and delivery by the railway company, of export cotton. It

was well understood that Westwego was meant in all cases, although the "port of New Orleans" was the term expressed in the through bills of lading, in all shipments over Texas and Pacific Railway. This clearly appears from the testimony in the case of the steamship agents who were called by the plaintiffs in error, and who knew respecting the situation at Westwego and New Orleans. On this subject the testimony of Fornaris, steamship agent at New Orleans for 18 years, is as follows:

"Q. Did your line in 1894 receive freight or cotton at any other docks than your own? A. Yes, sir; we would take freight from other docks. I am familiar with the customs and usages existing in this port as to the shipment of cotton to the various ports in Europe and was familiar with such usage and customs in 1894.

"Q. I believe you stated you had some vessels load at Westwego? A. Yes, sir.

"Q. Under what conditions, Mr. Fornaris, if any, did your vessels go to Westwego? A. Whenever there was a sufficient quantity of freight to justify my sending a vessel over there.

On cross-examination:

"Our line was accustomed to go to Westwego as well as to other wharves where freight was to be delivered,—where we could get freight—whenever there was a sufficient quantity to justify our going there. Under a previous arrangement with the Texas & Pacific we made an engagement with them that if they had so many bales we would go there to take them. But we only made these arrangements to go there under those circumstances, and if there was not enough to justify me I would not send a ship there. I would not send a ship anywhere for ten bales of cotton. There had to be a sufficient amount of cotton to justify me in sending for it. That was true at Westwego, Southport, on this side, Algiers or anywhere" (Record, pp. 31, 33).

On this point, the testimony of Le Blanc, 19 years a steamship agent, is as follows :

" Our line has carried cotton from this port continually since I have been agent here. In 1893 and 1894 cotton that our line carried was delivered to our ships everywhere. Cotton was delivered to our ships at other places than at our wharves. I have been the agent of that line 19 years.

" Q. Did you have occasion during those years to receive cotton from the Westwego wharves ? * * * A. Oh, yes ; we carried considerable. That was in 1894. That cotton was delivered at Westwego by the Texas & Pacific Railroad. I think all cotton delivered to us that year via. the Texas & Pacific Railway was delivered at Westwego. Before the construction of the wharves at Westwego we carried cotton from the Texas & Pacific Railway Company. Delivery was made at that time, some times at their own wharf, on this side, and sometimes at ours. It was all delivered from the New Orleans side of the river. I have been to Westwego. I was never at Westwego before the Texas & Pacific Railway Company built there. I do not know of any vessel that ever discharged a cargo or any part of it at Westwego prior to the erection of the wharves there. I do not remember any. I am familiar with the customs and usages existing at the port—that is New Orleans—in relation to the shipping of cotton from this port to foreign ports. * * *

" Q. Will you state whether or not, in 1894, or the year that the Westwego wharves were burned, you had a contract with the Texas & Pacific Railway Company to transport any certain amount of cotton ? A. I am sure we had ; different contracts. We made engagements from day to day. We did not have a general contract with them. These contracts that I speak of were in writing. No time was specified in those contracts at which we should go to Westwego for the cotton. * * *

" Q. Were there any custom house restrictions at that time and prior to March 20, 1893, that you know of about steamers going to Westwego and loading there or discharging there ? A. My recollection is that we used to have a custom house officer there, I don't know that there were any other restrictions. We had to enter before we went there. I don't think we

had to get permission to go there from the custom-house authorities; announced our intention of going there and they sent an officer. The Government paid for that officer. The shipper or ship did not have to pay for the officer " (Record, pp. 47, 48, 49).

On cross-examination this witness said :

" When I said that our ships received cotton everywhere before 1894 and 1893 I meant that they went to various points to receive cotton. I should think the bulk of the cotton carried by the Harrison line was received at other points than their own wharf. That custom was universal with steamships landing here in New Orleans. That is, at the terminals of railways the steamship lines were all accustomed to receive cotton which was shipped over the various rail lines which was to go from the rail lines to the steamship lines. It was also for a long time before that the custom for the steamship lines and the rail lines to unite in making what we called a through rate, which was a combining of the local rates of the two. That is, the railway company at the point of shipment would make a through rate to the shipper, in Liverpool, we will say, and that would be based upon a contract with the steamship company, by which the steamship company would accept a certain portion of that rate from the railway as its share of the carriage. Those are the kind of contracts or arrangements that I speak of that were in force in 1894 between our line and the Texas & Pacific Railway Company, and it was in accordance with this custom, or an arrangement of that sort, that the reception of the cotton by the steamship lines was the terminus of the railway. And that was so in the case of the Texas & Pacific, and had been so for several years before 1894. * * *

" Q. It was the understanding, was it not, that in these written contracts for through rates Westwego was the place of reception by the steamship company of the cotton ? A. Yes, sir.

" Q. And that had been so for some years prior to 1894, hadn't it ? A. I think so.

" Q. This wharf at Westwego is not the only wharf of the kind where similar shipments are made, is it ? A. No. There were not many others. There were only two others, and there were in 1894 ; they were at Southport and Gretna. Gretna is opposite New Or-

leans, on the west bank of the river—the same side as Westwego—a little further down near the city. And Southport is higher up, on the same side as the city of New Orleans. The same method of handling and receiving cotton was observed there. * * *

"Q. And your understanding was that you had entered into an arrangement with the railroad company to receive from the railroad company that much cotton at that rate? A. Yes, sir.

"Q. At Westwego, in the case of the Texas & Pacific? A. Yes, sir" (Record, pp. 50, 51).

Hammond thus testifies:

"I am a steamship agent. I have been engaged in that occupation since 1875 in New Orleans. * * * I have one wharf at the foot of St. Mary Street, in the city of New Orleans, but I load many of my steamers at the different terminals as well. Those lines were engaged in carrying cargoes from here to Europe, cotton, grain and general cargoes. Prior to 1893 cotton was delivered to our ships for transportation by whoever we engaged it from; we engaged from the Texas & Pacific Railway Company all the time. Some was delivered at our wharf on the New Orleans side, and some at Westwego; ever since the wharf has been built we send our steamers over there under certain conditions. Prior to the time when the wharf was built when there was no place to send them, of course we did not send them there. Then it was delivered on the New Orleans side of the river at my wharf or other landing places of my steamers. * * *

"Q. Could vessels, in your knowledge, go to Westwego to load cargo without special permission from the custom authorities? A. No. We always got permission because it wasn't within the New Orleans custom district at that time. After that it was made part of the port of New Orleans, but I forget the year exactly.

"Q. What was the nature of this special permission? A. Simply to notify the custom authorities that we desired to go there. I never knew a vessel to go to Westwego to load her cargo without first having notified the customs authorities" (Record, pp. 55, 56).

On cross-examination:

"I say that prior to the erection of this wharf at Westwego any cotton delivered by the Texas & Pacific Railway Company was delivered on the New Orleans side. It is what we call the 'city front,' and is where ships are loaded from the elevator or from Eighth Street down to the water-works and below Canal Street.

"Q. And that is composed of some 30 or 40 wharves? A. Not quite so many; ten, anyway. It is a continuous levee for about a mile and a half. It had been granted us by the corporation, and we had not room there, and so we had to go in other places where we could put a ship in. The Texas & Pacific Railway Company did not have a wharf for export here on the New Orleans side prior to the erection of that one at Westwego. They used to deliver at our wharf where our ship was. That might be at any one of these docks in the city.

"Q. Now, then, that custom was about the delivery of cotton from the Texas & Pacific Railway Company here along the city front on this side, prior to the erection of this wharf, after the erection of the wharf at Westwego, that was the recognized place of delivery for export cotton, was it not? A. At Westwego—it was their terminal.

"Q. And the steamship company goes over there in order to get this cotton for export on its steamers? A. Oh, yes, they go there; that is, for a certain amount of cotton.

"Q. And, in making arrangements for this export cotton, it is the custom of your line, as well as other steamship lines, to make an arrangement for what is known as a through rate for cotton, is it not? A. Yes, sir. * * *

"Q. In those bills of lading based upon shipments under arrangement, such as you describe for a through rate, it was customary, was it not, to describe the point at which the railroad would deliver the cotton as New Orleans; don't you know that? A. Always.

"Q. And that was understood to be Westwego, was it not? In the case of the Texas & Pacific, between the steamship lines. A. Yes, sir; that is the way we understood it for not less than a thousand bales. After Westwego was built that was the understanding; but I am at a loss to know exactly when it was

built. And after this arrangement it was delivered at Westwego.

"Q. And, when New Orleans was named, Westwego was included in that term as far as the Texas & Pacific was concerned? A. Yes, sir. * * *

"Q. After the erection of the dock it was recognized as commercially within the port of New Orleans —there were regular deliveries at Westwego? A. We called it New Orleans, although it was not officially New Orleans.

"Q. And, under bills of lading for shipment by the Texas & Pacific, it means New Orleans, and the Hammond and various lines of steamers received cotton continuously at Westwego, did they not? A. Yes, sir; since the erection of the dock" (Record, pp. 54, 55, 57, 59, 61, 62).

Testimony of Ross:

"I am a steamship agent and have been such in the city of New Orleans 25 years. These lines were engaged in carrying all kinds of goods to various ports in Europe. They carried cotton. Prior to the erection of the dock at Westwego, which was destroyed by fire on November 12, 1894, cotton was delivered to my lines for transportation by other parties and different railroads in town. Some by the Texas and Pacific Railway Company. It was delivered to us by the Texas and Pacific Railway Company at our regular wharf. It was delivered by all railroad companies at our regular wharf. After the erection of the docks at Westwego, cotton was delivered to my line mainly at the same place. I am familar with Westwego, but I have not been there recently. * * *

"Q. At the time of the fire was Westwego commercially the same as the port of New Orleans? A. Now, I don't recollect the time that it was brought in by act of Congress. It was not so considered before that act was passed only by courtesy and agreement—agreement between the railroad and the ship, or the shipper and the ship."

On cross-examination:

* * * "You speak of special arrangement with the railroad company for delivery at Westwego, do you mean an arrangement such as has been testified to

here, by which there would be an engagement for a stipulated number of bales of cotton at a certain sea rate, and the railroad company would thereupon go into the interior, arrange with shippers for the shipment of that cotton over their own lines, and over the steamship lines with which the sea rate was made? A. I mean the railroad would make a contract with the steamship agent, just exactly as any shipper would do, for the carriage of a certain amount of cotton on the terms specified in that contract; that was the special arrangement I refer to. A part of that special arrangement would be that I would go to take such such freight to Westwego" (Record, pp. 62, 64, 65).

The testimony of Sanders:

"I represented the West India and Pacific Steamship Company. I had represented that company about ten years in New Orleans prior to 1894. * * *

"Q. Prior to the erection of the dock at Westwego, which was destroyed in November, 1894, where was cotton delivered to your line for transportation? A. Well, we had cotton delivered to us at the different railway terminals and at our own wharf.

"Q. Where were the terminals at which cotton was delivered to you? A. There was the Illinois Central terminal at Southport. I think at that time we used the Southern Pacific at Gretna, and I suppose the Texas & Pacific at Westwego, also.

"Q. I am speaking of the time prior to the erection of this dock. A. I presume the Texas & Pacific was then delivered to us at our own wharf. But are you not wrong about the date of the erection of the Westwego wharf? I don't think I know exactly the date, but prior to that time I think the cotton would be delivered to us on the city front at our wharf.

"Q. After the erection of this dock at Westwego, where was cotton delivered to you for transportation by the Texas & Pacific Railroad? A. At Westwego, as a rule. I could not state how much cotton was delivered to us at Westwego. I could not give you the exact quantity."

On Cross-examination:

"Q. Now, after Westwego was opened, then cotton shipped in that way was shipped to Westwego and

there received by the steamship lines, was it not? A. As a rule, with the modification that I have already mentioned, that a certain quantity or number of bales must be there at one time for delivery.

"Q. Was that ever embodied in any agreement with the railroad or was it simply a general statement by the steamship lines that it would not pay them to go there for less than about 2,000 bales? A. I think that, so far as my line is concerned, my understanding is that it was probably in writing. I won't be positive about that. I won't say that positively. I am not positive about the agreement being in writing, but I should be inclined to think now that it was, but I think that after the erection of the wharf at Westwego all the cotton was loaded there—that is, all export cotton—so far as our lines was concerned.

"Q. That is, the delivery of export cotton in the city of New Orleans along the front had about practically ceased? A. Yes, sir. * * *

"Q. And the railway part of the line was usually described as from the point of shipment to New Orleans, was it not? A. Yes, sir.

"Q. And the ocean or steamship line was New Orleans to Liverpool, or whatever the port the cotton was destined for? A. Yes, sir.

"Q. And the point of delivery from the railway company to the steamship line under that class of bills of lading was always understood to be Westwego, was it not? A. Yes, sir; under the modification I have expressed.

"Q. And that even where the bookings did not express that the port of delivery was Westwego? A. Yes, sir" (Record, pp. 67, 68, 70, 71).

There is no testimony in the case contradicting the testimony of these steamship agents of long experience that not only had Westwego become the recognized point of delivery by the railroad company to the steamship companies of all export cotton after the erection of the dock, but that this was simply consonant to a universal custom of all the railway companies centering at that port, which had obtained for a

long series of years and had become the established method and practice of handling export cotton at that port. The testimony of the other witnesses called by the plaintiff in error—Woods, Fallon and Westfeldt—in no way affects the foregoing testimony of the Steamship Agents. They were in different lines of business, and knew nothing of Westwego save as it related to their own lines of trade. The case, therefore, as made by the testimony, falls exactly within the principle of the Devato Case cited in the brief of the plaintiff in error. The facts of the case are also exactly in accordance with the facts in the Devato case when we compare the language of Section 2568, establishing the collection district of New Orleans, with the language, referred to in the Devato Case, of Section 2535, establishing the district of the City of New York. Section 2568 is as follows:

"There shall be in the State of Louisiana two collection districts, as follows:

FIRST. The district of New Orleans; to comprise all the waters and shores of the State of Louisiana east of and including the northern portion of the Atchafalaya River down to a point due west from the northern boundary of the town of Plaquemine, in the parish of Iberville, and east of the Bayou Lafourche, and all the waters and shores of the Mississippi River, and of the rivers which empty into it, or any of its branches, except the waters and shores within the State of Mississippi, and except the west bank of the Mississippi River between the towns of Plaquemine, in the parish of Iberville, and Donaldsonville, in the parish of Ascension; in which New Orleans shall be the port of entry, to include the parish of Orleans, and that portion of the parish of Jefferson lying between the Mississippi River and Lake Pontchartrain, and between the upper line of the parish of Orleans, left bank, and a line running parallel thereto, commencing at the Mississipp River, at the upper line of the city of Car-

rollton, and extending to Lake Pontchartrain; and the ports of delivery shall be as follows:

Bayou Staint John; Pontchartrain, on Lake Pontchartrain; Pittsburgh, in Pennsylvania; Wheeling, in West Virginia; Cincinnati, in Ohio; Louisville, in Kentucky; Saint Louis, in Missouri; Nashville, in Tennessee; Memphis, in Tennessee; Evansville, in Indiana; New Albany, in Indiana; Burlington, in Iowa; Galena, in Illinois; Alton, in Illinois; Quincy, in Illinois; Lakeport, to include the lake terminus of the new canal; Madison, in Indiana; Paducah, in Kentucky; Jeffersonville, in Indiana; Cairo, in Illinois; Keokuk, in Iowa; Dubuque, in Iowa; Parkersburg, in West Virginia; Leavenworth, in Kansas; Omaha, in Nebraska; Kansas City, in Missouri; Saint Joseph, in Missouri; Shreveport; La Crosse, in Wisconsin."

The language designating the district of the City of of New York, considered by Judge BROWN in deciding the Devato Case, is as follows:

"Section 2535 * * *

"SECOND. The district of the city of New York; to comprise all the waters and shores of the State of New York, and of the counties of Hudson and Bergen in the State of New Jersey, not included in other districts; in which New York shall be the port of entry, and New Windsor, Newburgh, Poughkeepsie, Esopus, Kinderhook, Albany, Hudson, Troy, Rhinebeck Landing, Cold Spring and Port Jefferson ports of delivery; and Jersey City a port of entry and delivery with an assistant collector to act under the collector at New York."

From this description, it will be seen that Westwego, was within the collection district of New Orleans, but was not within the designated limits of the port of entry of New Orleans, as Brooklyn was not within the designated limits of the port of entry of New York.

We beg to call attention to the discussion of this question of deviation in the brief in the Reiss Case, where the same question is involved and presented

upon the record in that case, and to the following authorities cited and discussed there:

Devato vs. 823 Barrels of Plumbago (D. C.), 20 Fed. Rep., 510.

Sailing Ship Gorston Co. vs. Hickie, 15 Q. B. Div., 580.

Price vs. Livingston, 9 Q. B. Div., 679.

Loomis vs. The Wabash, St. Louis & Pacific Railway Company (17 Missouri Appeals, 340).

Harrower vs. Hutchinson, 38 L. J. (Q. B.), 185.

Hostetter vs. Park, 137 U. S., 30.

We do not here repeat the discussion of the foregoing authorities here, but submit that they clearly establish the proposition that the word "port" as used in bills of lading must be understood in its commercial sense, and as such it was used in this bill of lading with reference to the universal usage and custom of the railway companies, to deliver all export cotton to the steamship lines at New Orleans, at their terminals. No authority to the contrary of this is cited in the brief of the plaintiff in error. The Devato case, when examined, sustains our contention in all essentials. "Westwego" was included in the term "port of New Orleans" used in the bill of lading in this case. The carriage of the cotton there was in accordance with the contract with the shipper and was a full compliance with the contract by the Texas and Pacific Railway Company, and in no sense was it a deviation from the terms of the contract of shipment.

IV.

In the discussion of the question of negligence of the railroad company, it is further stated in the brief that it was clearly negligent for the defendant railway company to receive and carry this cotton to Westwego, notwithstanding the accumulation of cotton at that point. The language of the brief is as follows:

"Notwithstanding this accumulation of cotton, the defendant received this cotton at Greenville, Texas, intending to take it to Westwego. The bill of lading is dated October 29" (Brief, p. 28).

Several authorities are cited under this proposition and evidently it is much relied upon, with other matters, to establish the negligence of the defendant. The falsity of the statement is shown at once by an examination of the bill of lading, by which it appears that this shipment was made at Greenville, Texas, a station on the Sherman, Shreveport and Southern Railway (Record, p. 169). The way-bills offered also indicate that the Texas and Pacific Railway Company was a mere intermediate carrier (Record, pp. 189, 190).

The cases which are cited (brief, pp. 27, 28), to the effect that it is negligence on the part of a carrier to receive goods, knowing that delays are bound to occur by reason of accumulation of freight on its line, have no application to this case, and an examination of the cases cited in the brief under this head will show that they are peculiarly inapplicable, because not only did the carrier which received the cotton involved in those cases delay it a long time in the course of its carriage, but kept it awaiting further carriage in a peculiarly

dangerous location, and upon this latter ground the carrier was ultimately held liable.

The case of Deming vs. Norfolk and Western R. R. Co. (21 Fed. Rep., 25) is in point upon the question in the case at bar, and not the authorities cited in the brief of the plaintiff in error. The facts in the Deming Case are entirely similar to the facts in the case at bar, while the facts in the cases cited in support of the proposition of the brief of the plaintiff in error are entirely different, and the cases, therefore, should not influence the decision of this case in this particular.

V.

For the foregoing reasons, and for the reasons stated in our main brief, the judgments of the Circuit Court and of the Circuit Court of Appeals should be affirmed.

Respectfully Submitted,

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